DRAFT (8/23/00)

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: PETITION OF CAPE LIGHT COMPACT ET AL.

FOR APPROVAL OF AGGREGATION PLAN DTE 00-47A

INITIAL COMMENTS OF THE CAPE LIGHT COMPACT

I. INTRODUCTION

The Cape Light Compact ("Compact")[(1)] submits these comments in response to the notice the Department of Telecommunications and Energy ("Department") issued in DTE 00-47A on August 10, 2000. In this docket, the Department is considering the request of the Compact, in its role as a municipal aggregator, to be allowed access to the billing envelopes sent by Commonwealth Electric Company ("Commonwealth" or "Company"). The Compact seeks access for the purpose of providing notices to customers that must be sent under G.L. c. 164, §134(a). The Compact appreciates the opportunity the Department has provided interested parties to file their comments.

II. THE DEPARTMENT SHOULD GRANT THE COMPACT ACCESS TO COMMONWEALTH'S BILLING ENVELOPES

A. Legal Context of Municipal Aggregation and Notice Requirements

The 1997 Restructuring Act (St. 1997, c. 164) provides the legal authority for a municipality (or group of municipalities) "to aggregate the electric load of interested electricity consumers within its boundaries" and to operate aggregation programs. G.L. c. 164, §134(a).

The Department's recent decision in DTE 00-47 fully describes the requirements that

municipal aggregators such as the Compact much meet to obtain the Department's approval. Relevant to this comment docket, the Restructuring Act provides:

It shall be the duty of the aggregated entity to fully inform participating ratepayers in advance of automatic enrollment that they are to be automatically enrolled and that they have the right to opt-out of the aggregated entity without penalty. In addition, such disclosure shall prominently state all charges to be made and shall include full disclosure of the standard offer rate, how to access it, and the fact that it available to them without penalty.

G.L. c. 164, §134(a), 6th ¶. The burden of notifying customers falls squarely on the shoulders of the Compact. This burden gives rise to the Compact's request for access to the Company's billing envelopes.

B. Nature of the Compact's Request

In its initial "Petition Seeking Approval of Aggregation Plan" filed in DTE 00-47 (at 6-7), the Compact asked the Department to rule "that it [the Compact] may include in the Company's monthly envelopes the notification to customers required by law, in order to minimize

costs to customers." The Compact would need to insert the required notice in advance of switching the various customer classes over to its power supply program, on a phased-in basis.

The Compact estimates that allowing it access to the Company's envelopes will save customers $50,000, primarily in lower postage costs. The Compact would, however, pay the Company for any incremental handling costs the mailing would impose.

The Compact must make every effort it can to reduce administrative costs. In the current market for electric generation, margins are extremely thin to non-existent. Reducing mailing costs could have an impact on the decision of the Compact's supplier to initiate power supply.(2) Reducing costs will also benefit customers financially because the supplier must share a portion of any reduced administrative costs with the Compact's customers.(3)

Notably, the Department has already granted the Compact's request for a waiver of the provisions of 220 C.M.R. § 11.06 that require quarterly disclosure of prices, resource portfolios and emissions and labor characteristics. DTE 00-47 (August 10, 2000), at 27. The Department found that "the Compact's alternate information disclosure strategy will allow it to provide the required information to its customers as efficiently as quarterly mailings," given the scope and content of the Compact's Public Education Plan. *Id.*, at 28. The Department's ruling also provides the ancillary benefit of reducing the Compact's mailing costs.

By requesting access to the Company's billing envelope, the Compact similarly seeks an effective and efficient means of providing mandated information to customers, at lower

cost than other options. In the initial phases of the Compact's power supply program, the Compact will not need to access the Company's billing envelopes because the number of customers who will receive competitive supply is relatively small. The Compact can easily reach these customers through various direct means.[(4)] As the smaller commercial customers are phased in (no earlier than September 2001) and, ultimately, as residential customers are phased in (no earlier than September 2002), the Compact will need to rely on mass mailings. Using the Company's billing envelopes is an effective and relatively low cost method of providing the required notification.

The Compact's request is not unprecedented. Under G.L. c. 164, §1B(d), the legislature has already determined that a distribution company can be required to insert into its own billing envelope information from a third-party default service provider:

Notwithstanding the actual issuer of a ratepayer's bill,[(5)] **the default service provider shall be entitled to furnish a one-page insert accompanying the ratepayer's bill.**

(Emphasis added). If third-party default service providers are allowed "to furnish a one-page insert" with the distribution company's bills, there is even more reason to allow a municipal aggregator to include a one-page insert in monthly bills so that the aggregator can provide the notice mandated by G.L. c. 164, §134(a)(initial notification of automatic enrollment). Under G.L. c. 164, §1B(d), the default service provider could include the one-page insert monthly. Here, the Compact only seeks access to the Company's billing envelope prior to enrolling each customer class (or group of customer classes). See Compact's initial filing, Vol. I, Tab 4, Exh. A (schedule for phase-in of customer classes).

C. Legal Issues: Authority of Department and First Amendment Concerns

State legislatures and utility regulatory agencies (such as the Department) generally may require regulated companies to include in monthly billing envelopes information that customers need to understand the services being provided or to learn of relevant regulatory proceedings. *See e.g. Pacific Gas and Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 16, n. 12, 106 S.Ct. 903 (1986)("The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations")(hereafter, "PG&E"). The Department and other state agencies already require regulated companies to include a range of information and inserts in their bills that the companies might not willingly include on their own, such as energy conservation service program announcements (225 CMR 4.06); notices of proposed rate increases (220 CMR 5.06)[(6)]; notices of the Department's termination protections (serious illness, winter moratorium, infant)(220 CMR 25.03(5)); notice to tenants regarding delinquent accounts of landlords (220 CMR 25.04(6)); notices regarding the rights of elderly customers (220 CMR 25.05); and mandatory disclosure of prices, fuel sources, emissions and labor characteristics (220 CMR 11.06). Almost three decades ago, the Supreme Judicial Court rejected a challenge by utility companies to the Department's

authority to promulgate the billing and termination regulation that mandate many of the disclosures just cited. *Cambridge Electric Light Co. v. DPU*, 363 Mass. 474 (1973); *see also* G.L. 164, §76C ("The department may establish from time to time such reasonable rules and regulations consistent with this chapter as may be necessary to carry out the administration thereof"). No case before or since has questioned the authority of the Department to order a company to include in monthly billing envelopes information customers may need.

The Restructuring Act (St. 1997, c. 164) reinforces the importance of customers receiving relevant information from third parties (that is, someone outside of the customer-distribution company relationship) when this is in fact an appropriate means of getting the information to customers. Thus, in adopting G.L. c. 164, §1B(d)(included in section 193 of the Restructuring Act), the legislature granted "the default service provider" the right to "furnish a one-page insert accompanying the ratepayer's bill." By its plain language, this provision grants a non-governmental third party repeated, monthly access to distribution company bills. In G.L. c. 25A, §11D (included in section 50 of the Restructuring Act), the legislature required the Division of Energy Resources to develop consumer education materials, "including billing inserts," about restructuring. The legislature has clearly acknowledged that billing inserts may be the best means for both government agencies and energy providers to get important information to consumers.

Commonwealth Electric Company insists, however, that mandating the insertion even of factually-accurate information in its monthly billing envelopes would violate its First Amendment rights,[(7)] relaying primarily on the PG&E case. See "Initial Comments of the Commonwealth Electric Company" in DTE 00-47 (June 7, 2000). As the Compact argued in its "Response to Commonwealth Electric Company's Reply" in DTE 00-47 (June 26, 2000), the PG&E case is inapposite. In PG&E the commission allowed a consumer group that regularly opposed the company in commission proceedings the right to place inserts four times a year into the company's envelopes, "plac[ing] no limitations on what TURN [the consumer group] . . . could say in the envelopes." 475 U.S. at 7. TURN's inserts were highly critical of the company and solicited funds for TURN's activities. Here, the Compact seeks to insert statutorily-mandated notices that would be reviewed by the Department prior to mailing to ensure that the information conveyed was accurate and objective. The distinction could not be clearer.

In a highly similar factual context, the Maine Supreme Court recently rejected a utility company's First Amendment challenge to including mandated information in mailings to customers. *Central Maine Power Co. v. Public Utilities Commission*, 734 A. 2d 1120 (Me. 1999). The Maine legislature adopted its Restructuring Act in 1997, offering consumers the right to purchase electricity generation services from competitive suppliers. The Maine statute, like the Massachusetts Restructuring Act (see G.L. c. 25A, §11D), required a state agency to develop a customer education program.[(8)] From the outset, Central Maine Power ("CMP") raised concerns about "the substantial restraints that the proposed [Maine PUC] rule would impose on an electric utility's First Amendment rights to free speech." *Id.* at 1124.

CMP challenged, *inter alia*, a rule that "require[s] that electric and transmission and distribution utilities disseminate information produced as part of the Commission's education program." *Id.* at 1125. In reviewing CMP's First Amendment claims, the court noted that consumer "education about deregulation is a matter of state public concern." *Id.* at 1126. Because of the state's "compelling interest in ensuring that consumers get information about deregulation," the court rejected CMP's argument "that requiring T&D facilities to include Commission educational materials with the materials they disseminate to their customers is an unconstitutional content-based restriction on non-commercial core speech." *Id.* at 1129. The court also emphasized, drawing a sharp contrast to the facts in the PG&E case, that the educational materials to be included in CMP mailings would be "objective descriptions of the deregulation of the electricity generation industry and the retail access choices of consumers." The court specifically rejected the alternative of "directly mailing [the PUC's] education materials to consumers" because this "would hinder the Commission's achievement of its interests." *Id.* at 1130. The court perceived bill inserts as more effective than direct mailings.

Here, the Compact seeks a Department order that would allow the Compact to insert information about its aggregation program and the automatic enrollment of customers in that program, in order that the Compact may carry out its obligations under G.L. c. 164, § 134(a). As in the CMP Case, the state of Massachusetts has a "compelling interest in ensuring that consumers get information about" automatic enrollment and municipal aggregation. 734 A.2d at 1129. The Compact would submit the proposed inserts to the Department for its review, to make sure that the inserts complied with §134(a) and contained "objective descriptions of the deregulation of the electricity generation industry and the retail access choices of consumers." 734 A.2d at 1130. The case law clearly allows the Department to issue the requested order without violating the Company's First Amendment rights.

D. The Compact's Request is Necessary and Reasonable

While the Department has the authority to grant the Compact's request without violating the Company's First Amendment, the Department still has the discretion to decide whether it should do so. The Compact's request is necessary and reasonable, given the statutory mandate to provide notice.

The Compact has proposed a broad Public Education Program (described in the Compact's initial filing, Vol. I, Tab 2, pp. 15 -20), and the Department viewed that Program favorably in approving the Compact's request for waiver of the quarterly notification requirements of 220 C.M.R. 11.06(4)(c). DTE 00-47, at 28. Relevant to DTE 00-47A, the Compact intends to use bill inserts as only one means of notifying customers of the automatic enrollment process, of their opt-out rights, and of the other information that must be disclosed under G.L. c. 164, §134(a), 6th ¶. The overall Education Program is aimed at thoroughly and properly preparing specific customer classes for automatic enrollment prior to actual transition to competitive supply. Thus, the Compact disagrees with arguments the Company has made that bill inserts will be ineffective. The Compact will not rely on any single mailing as the means of educating customers and complying with §134(a). While bill inserts alone are not guaranteed to reach all customers, they are still a highly effective tool and one that the Compact plans to use.

In addition to being effective in reaching customers, bill inserts are much less expensive than a separate mailing. The Compact estimates that it can save $50,000 by using bill inserts. This will increase the amount of money available to support other means of public education. As the Compact discussed in its initial filing (Vol. I, Tab 2, pp. 15 - 16), it will use a "layering" approach of presenting its messages through varied media - not only bill inserts, but also public service ads; cable TV; local government; various business, religious, social and civic organizations; handouts and electronic communications. The Compact has received a grant from the Division of Energy Resources that it will use to help develop information targeted to each customer class. Any savings on mailing costs will help fund the broad public education effort.

In its comments in DTE 00-47, the Company objects that customers will be confused if they receive bill inserts about the Compact's aggregation program in monthly billing envelopes. The Compact, however, is willing to submit its proposed inserts to the Department to make sure they are accurate, objective, and easy to understand. Companies already must include information developed by the Department itself in billing envelopes [(9)], **yet the Compact is unaware of any objections by any distribution or gas company that these notices improperly confuse customers or unduly burden the company with calls. A properly designed bill insert will make it clear that the Compact, not Commonwealth Electric, is sending the insert and that questions should be directed to the Compact.**

III. CONCLUSION

The Department should grant the Compact's request for access to the Company's billing envelopes, for the purpose of inserting factually-accurate and objective notices that are required by G.L. c. 164, §134(a).

September 1, 2000 Respectfully Submitted,

CAPE LIGHT COMPACT et al.

Charles Harak, Esq. (charak@bck.com)

Jeffrey M. Bernstein, Esq. (jbernstein@bck.com)

BERNSTEIN, CUSHNER & KIMMELL, P.C.

585 Boylston Street, Suite 200

Boston, MA 02116

617-236-4090 (voice)

617-236-4339 (fax)

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1. [1] The Compact, the petitioner in DTE 00-47, includes the towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, and the counties of Barnstable and Dukes.

2. [2] Under the Energy Supply Agreement ("ESA") between the Compact and its supplier, the supplier may postpone initiation of service to customers if market conditions are not favorable. See Vol. I, Tab 4, Exh. A of the Compact's initial filing in DTE 00-47.

3. [3] See Vol. I, Tab 4, ESA Art. 3.2.

4. [4] For example, the street lighting and municipal account customers who must receive notice in the first phase of the power supply program are members of the Cape Light Compact. The G3 customers included in the first phase number only a few dozen [check!]. [How will we notify these customers -- any plan to do this in person at all?]

5. [5] At the moment, only distribution companies provide monthly bills for basic distribution service. The Department is considering other options in DTE 00-41.

6. [6] This regulation was adopted in response to a petition of consumers. While various companies raised objections, none of those objections raised First Amendment claims.

7. [7] In comments filed in DTE 00-41, regarding competition for metering, billing and information services, a group of "Competitive Retail Providers" noted that they "are ready and willing to present all state-mandated information that an LDC would need to present in a bill." Comments, at 8. These largely unregulated companies raised no First Amendment concerns about including inserts developed by others.

8. [8] In Maine, the PUC itself adopts the education program.

9. [9] The Compact understands that companies will be including an information insert on restructuring within the next few months.